

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7 (1) 41 33

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
HECTOR CRUZ, MATTHEW GULLEY and
CARMINE PERELLI, individually and
on behalf of all other persons
similarly situated,

Plaintiffs-Appellees,

GEORGE DUNLEAVY, LOUIS POVEROMO,
NICHOLAS PECHAR and GEORGE MITCHELL,

Intervenors-Plaintiffs-Appellees,

-against-

BENJAMIN WARD, individually and in
his capacity as Commissioner of the
New York State Department of
Correctional Services, VITO M.
TERNULLO, individually and in his
capacity as Director of Matteawan
State Hospital, and LAWRENCE SWEENEY,
individually and in his capacity as
Chief of Psychiatric Services at
Matteawan State Hospital,

Defendants-Appellants.
-----X

BRIEF FOR APPELLANT

appellant

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel



TABLE OF CONTENTS

	<u>PAGE</u>
Question Presented.....	1
Statement.....	2
Prior Proceedings.....	2
The Hearing.....	4
Opinion Below.....	7
ARGUMENT - NEW YORK STATE PRISON INMATES HAVE NO DUE PROCESS RIGHT TO NOTICE OF A DECISION TO TRANS- FER THEM, ITS FACTUAL BASIS, IDENTIFICATION OF THE DECISION MAKERS OR REVIEW BY AN INDEPENDENT HEARING OFFICER PRIOR TO THEIR RETURN TO A CORRECTIONAL FACILITY.....	8
A. Plaintiffs have no statutory right to treatment at Matteawan State Hospital.....	3
B. A right to medical treatment has never been recognized as a property right within the Fourteenth Amendment.....	16
C. Even assuming <u>arguendo</u> only that plaintiffs have a statutory right to psychiatric treatment at Matteawan State Hospital, plaintiffs are not entitled to the procedures identified by the District Court.....	17
Conclusion.....	20

TABLE OF CITATIONS

<u>Cases</u>	<u>PAGE</u>
<u>Bell v. Burson</u> , 402 U.S. 535 (1971).....	17
<u>Cafeteria Workers v. McElroy</u> , 367 U.S. 886 (1961).....	18
<u>Estelle v. Gamble</u> , 45 U.S.L.W. 4023 (U.S. Nov. 30, 1976).....	16, 17
<u>Goldberg v. Kelly</u> , 397 U.S. 254 (1970).....	17
<u>Goss v. Lopez</u> , 419 U.S. 565 (1975).....	18
<u>Kesselbrenner v. Anonymous</u> , 39 A D 2d 410, 334 N.Y.S. 2d 738 (2d Dept. 1972), revd. 33 N Y 2d 161, 350 N.Y.S. 2d 889 (1973).....	7, 9, 12, 14
<u>Lake Carriers Assoc. v. MacMullan</u> , 406 U.S. 498 (1972).....	14
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976).....	18
<u>Meachum v. Fano</u> , 44 U.S.L.W. 5053 (U.S. June 25, 1976).....	4, 10, 11
<u>Montanye v. Haymes</u> , 44 U.S.L.W. 5051 (U.S. June 25, 1976).....	4, 10, 11, 15
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972).....	17
<u>Perry v. Sinderman</u> , 408 U.S. 593 (1972).....	17
<u>Preiser v. Rodriguez</u> , 411 U.S. 475 (1973).....	15
<u>Reetz v. Bozanich</u> , 397 U.S. 82 (1970).....	14
<u>United States ex rel. Schuster v.</u> <u>Herold</u> , 410 F. 2d 1071 (2d Cir. 1969), <u>cert. den.</u> 396 U.S. 847.....	9, 12, 14

	<u>PAGE</u>
<u>Younger v. Harris</u> , 401 U.S. 37 (1971).....	14
<u>Zurak v. Regan</u> , Slip Sh. Op. 425 (2d Cir. Feb. 7, 1977).....	19

STATUTES

New York

Correction Law § 401.....	7, 16
Correction Law § 408.....	2, 5, 10
Correction Law § 409.....	13
Correction Law § 410.....	3, 7, 12, 13

United States

42 U.S.C. § 1983.....	3
-----------------------	---

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

HECTOR CRUZ, MATTHEW GULLEY and :
CARMINE PERELLI, individually and :
on behalf of all other persons :
similarly situated, :

Plaintiffs-Appellees, :

GEORGE DUNLEAVY, LOUIS POVEROMO, :
NICHOLAS PECHAR and GEORGE MITCHELL, :

Intervenors-Plaintiffs-Appellees, : Docket No. 77-7043

-against- :

BENJAMIN WARD, individually and in :
his capacity as Commissioner of the :
New York State Department of :
Correctional Services, VITO M. :
TERNULLO, individually and in his :
capacity as Director of Matteawan :
State Hospital, and LAWRENCE SWEENEY, :
individually and in his capacity as :
Chief of Psychiatric Services at :
Matteawan State Hospital, :

Defendants-Appellants. :

-----X

BRIEF FOR APPELLEES

Question Presented

Do plaintiffs, New York State inmates, who have
been transferred to Matteawan State Hospital, have a right
to psychiatric treatment at Matteawan State Hospital until

they have recovered from their mental illness pursuant to Article 16 of the New York Correction Law such that they are entitled to written notification of a transfer decision to return them to a state correctional facility and its factual basis, identification of the decision makers, ending the use of the treatment staff as the sole decision makers and some type of professional review which will be free from administrative pressures?

Statement

This is an appeal from an order of the United States District for the Southern District of New York dated December 17, 1976 which held that New York inmates at Matteawan State Hospital have a state created right to psychiatric treatment and are entitled to certain procedural safeguards prior to their return to a New York State Correctional Facility (Goettel, J.).

Prior Proceedings

Plaintiffs are or were New York State inmates who were transferred to Matteawan State Hospital pursuant to New York Correction Law § 408 (McKinney's Supplement

1975-1976). They instituted this action on October 28, 1975 pursuant to 42 U.S.C. § 1983 claiming, inter alia, that their return to a State Correctional Facility without a hearing violated their rights to due process of law under the Fourteenth Amendment of the United States Constitution and New York Correction Law § 410 (McKinney's 1968).*

They also claimed that they were entitled to a hearing and other procedural safeguards prior to their return to a Correctional Facility since their transfers back to state prison was punitive in nature and their release from Matteawan subjected them to a greivous loss. By order to show cause dated October 28, 1975, plaintiffs moved for a preliminary injunction and class action status.

On November 28, 1975, Judge Dudley Bonsal referred the hearing on the motion for a preliminary injunction to United States Magistrate Gerard L. Goettel. An evidentiary hearing was held on December 30, 1975, January 27, 1976, March 8, 1976 and March 10, 1976. Subsequently the case was transferred to Judge Gerard L. Goettel.

* The original plaintiffs were Hector Cruz, Matthew Gulley and Carmine Perrelli. On December 15, 1975 George Dunleavy, Louis Poveromo, Nicholas Pechar and George Mitchell moved to intervene. This application was granted.

The Hearing

Plaintiffs Cruz, Gulley, Dunleavy, Poveromo and Mitchell testified at the hearing. To establish their allegation that their return to a state correctional facility inflicted a grievous loss, their testimony was essentially a recitation of asserted differences between the treatment accorded them at Matteawan and the various state correctional facilities where they had been incarcerated. To establish that transfers at Matteawan are punitively motivated, they attempted to relate an altercation or unpleasant episode at Matteawan with a decision to return them to State Prison.*

Dr. Lawrence Sweeny, Dr. Ali Sirman, Dr. VicArthur Factora, Dr. Atilla Cakir, Dr. Jack Wright and Dr. Seymour Feldman testified for the defendants. Dr. Sweeny stated he was the Chief of Psychiatric Services at Matteawan State Hospital (189). He explained that the only entry to Matteawan is by a commitment pursuant to Correction Law

* Since the hearing ordered by the District Court, the United States Supreme Court has held in unequivocal terms that absent a statutory scheme securing a claim of entitlement to a particular right, the fact that a transfer results in a grievous loss or is punitively motivated is irrelevant for due process purposes. Meachum v. Fano, 44 U.S.L.W. 5053 (U.S. June 25, 1976); Montanye v. Haymes, 44 U.S.L.W. 5051 (U.S. June 25, 1976).

§ 408. Pursuant to this Section, individuals are certified to Matteawan by two outside court appointed doctors. Their diagnosis does not always conform to the diagnosis of the Matteawan staff. There are seven psychiatrists at Matteawan including himself. The population is 319 (216).

Patients at Matteawan may have visitors all day, from 9 a.m. to 4 p.m. The transportation from New York City is good. Eighty-five percent of the population are New Yorkers (244-246). Because the inmates are patients, there are no misbehavior sanctions (218), no loss of good time (246). A lot of men would rather do their time at Matteawan. It is an easier bit (246).

Dr. Sweeny stated that a fight was not a basis for release from Matteawan. The patients get into fights everyday. He has never given any orders that this should be the basis for a transfer back to a correctional facility. The staff consists of all qualified doctors who make up their own mind (260-261). If an inmate is ready to leave Matteawan, he should. The prisons have better vocational programs. They utilize patients energies better, teach him something (360).

Dr. Ali Sirman testified he is the Chief Psychiatrist at the Diagnostic Evaluation Clinic at Fishkill Correctional Facility (378). He evaluates patients for return to Correctional facilities (381). If he is functioning and non-psychotic, he discharges him. There are some neurotics who stay, but the budget, the institution's physical possibilities can not go above three hundred and thirty. If they kept all neurotics, they would need a 10,000 bed hospital (382).

Dr. Jack Wright testified he is an Assistant Commissioner, New York State Department of Mental Hygiene in charge of forensic services with responsibility for psychiatric services at the State Correctional Facilities (576-77).

He explained that each state prison has a mental hygiene unit. Attica has two full time Board certified psychiatrists, one Ph. D. psychologist plus part timers. Bedford Hills has one full time psychiatrist, one 3/5's time psychiatrist and three full time Ph. D. psychologists (581). Green Haven has two part time psychiatrists; Clinton has one full time, three part time psychiatrists; Fishkill has the services of Matteawan; Auburn has two part timers, others as required; Elmira has part time psychiatrists

making up a full week together and 4 full time psychologists; Wallkill has limited facilities part time. Eastern has three full time psychologists and psychiatrist. They come in as required and on a regularly scheduled basis (665).* Medications are available at the correctional institutions (581).

Opinion Below

The District Court held that Article 16 of the New York Correction Law grants New York State prison inmates a right to treatment for mental illnesses incurred while in confinement. The Court stated that New York Correction Law § 410 provides that treatment at Matteawan shall only be terminated when the inmates have recovered from their illnesses. Citing Kesselbrenner v. Anonymous, 39 A D 2d 410, 334 N.Y.S. 2d 738 (2d Dept. 1972), revd. on other grounds, 33 N Y 2d 161, 350 N.Y.S. 2d 889 (1973), the District Court stated that the New York Courts have recognized Article 16 as mandating that the Department of Corrections provide treatment for individuals confined

* Under Laws of New York, c. 766 § 1 (McKinney's Supplement 1976-1977, Correction Law § 401) the Department of Mental Hygiene assumed formal control of psychiatric services at the State Correctional Facilities as of September 1, 1976.

at Matteawan. The Court held that New York law was clear and declined to abstain on the right to treatment issue. The Court went on to hold that, at a minimum, plaintiffs were entitled to written notification of the transfer decision and its factual basis, identification of the decision makers, ending the use of the treatment staff as the sole decision makers, and some type of professional review which will be free from administrative pressures. ,

ARGUMENT

NEW YORK STATE PRISON INMATES
HAVE NO DUE PROCESS RIGHT TO
NOTICE OF A DECISION TO TRANS-
FER THEM, ITS FACTUAL BASIS,
IDENTIFICATION OF THE DECISION
MAKERS OR REVIEW BY AN INDEPENDENT
HEARING OFFICER PRIOR TO THEIR
RETURN TO A CORRECTIONAL FACILITY

A. Plaintiffs have no statutory
right to treatment at Matteawan
State Hospital

The District Court held that New York Law provides New York State inmates a right to treatment for mental illnesses incurred while in confinement and went on to conclude that due process must be accorded an inmate prior to his return from Matteawan State Hospital to a State

Correctional Facility. In concluding that there is a right to treatment under New York Law, the District Court erroneously construed Article 16* of the New York Correction Law and distorted the opinions of the New York Court of Appeals and the Appellate Division in Kesselbrenner v. Anonymous, supra.

The District Court revealed its complete misunderstanding of the difference between a right to treatment if confined at Matteawan as mandated by United States ex rel. Schuster v. Herold, 410 F. 2d 1071 (2d Cir. 1969), cert. den. 396 U.S. 847, and the right to be at Matteawan and receive treatment for a mental illness pursuant to State law.

Matteawan State Hospital is but one institution maintained by the State of New York for incarcerated felons. As made clear by the United States Supreme Court, under New York law an inmate has no state created "right to remain at any particular prison facility . . . [A]dult persons sentenced to imprisonment are not sentenced to particular institutions but are committed to the custody of the Commissioner of Corrections. . . . Thereafter, the Commissioner is

* A copy of this Article is annexed hereto.

empowered by statute to transfer an inmate from one correctional facility to another". Montanye v. Haymes, 44 U.S.L.W. 5051 (U.S. June 25, 1976).

"As long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him and are not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight". Meachum v. Fano, supra, 5052-5053.

Article 16 of the New York Correction Law is no exception to these principles. Indeed, the provisions of Article 16 are but further amplification of the discretion retained under New York law by prison authorities to move prisoners from one institution to another. Under New York Correction Law § 408(1), only the physician and superintendent of the correctional facility where the inmate is confined may initiate proceedings to transfer the inmate to Matteawan State Hospital. The inmate has absolutely no right under New York law to initiate proceedings to commit himself to Matteawan State Hospital. Similarly, he has no statutory right to continue his retention there. Section 408(8) provides

that only the director of the hospital may initiate proceedings to retain an inmate at Matteawan.

The mere fact that the Department of Corrections maintains a hospital for the mentally ill does not create a right in an inmate to remain there simply because at some point he is transferred to such institution. In Meachum v. Fano, supra, the United States Supreme Court outrightly rejected the right of an inmate to remain at a medium security institution simply because he had been sent there. The court stated:

" . . . no Due Process liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events." Montanye v. Haymes, supra 5052.

In short, plaintiffs under the New York scheme have no statutory right to psychiatric treatment at Matteawan or elsewhere. Rather as required by United States ex rel. Schuster v. Herold, supra, what plaintiffs are given under the New York scheme are procedural protections against, not for, a declaration of incompetency, i.e., that they will not be sent to or retained at a mental hospital unless the state establishes their mental illness and need for treatment at a mental hospital.

The District Court in an attempt to undermine the clear purpose of Article 16, i.e., to give procedural protections prior to a declaration of incompetency and periodic review of that declaration as mandated by the United States Constitution and enunciated in Schuster, reads Section 410 of the New York Correction Law and Kesselbrenner v. Anonymous, supra, to create a statutory right to treatment until recovered. However, this conclusion is unwarranted and unsupported by New York statutory and case law.

Section 410 of the Correction Law* must be read in conjunction with Section 409. Both sections are at the conclusion of Article 16 and set forth the disposition to be made of an inmate if the hospital administration has determined not to retain him at Matteawan. Section 409 details where an inmate is to be sent if his term has expired. Section 410 details where an inmate whose term has not expired is to be sent - he is to be returned to a correctional facility.

The conclusion that § 410 is a procedural provision only is further supported by the fact that it appears at the end of Article 16. Surely if the legislature intended to give every inmate at Matteawan an enforceable right to remain there until recovered it would have said so in a preamble to the Article, or at least at the beginning of the Article, and moreover, would have given them a right to commit themselves to Matteawan in the first place.

* This section has been repealed effective April 1, 1977. Correction Law, Art. 16, McKinney's Supp. 1976-1977.

In clear and uncertain terms, under New York Law, it is left to the discretion of the Matteawan Director to determine when an inmate is to be returned to state prison, there to continue treatment if necessary.*

The District Courts' construction of the holding of Kesselbrenner to support its holding is ludicrous. Kesselbrenner gives no right to treatment at Matteawan. It simply follows Schuster and the Appellate Division reaffirms, in dicta, that it would be unlawful to confine someone at a mental hospital for care and then not provide treatment. The court in Kesselbrenner was concerned with an issue not even tangentially relevant here - the proper procedure to be followed on transferring a civilly committed individual to a mental institution for those convicted of a crime.**

* All state correctional facilities having psychiatric services available (Hearing, Dr. Wright pp. 581, 685).

** In the absence of any New York decision deciding the right to treatment issue under Article 16, at the very least, the District Court should have abstained and given the New York Courts an opportunity to interpret its own statute. Lake Carriers Assoc. v. MacMullan, 406 U.S. 498 (1972); Younger v. Harris, 401 U.S. 37 (1971); Reetz v. Bozanich, 397 U.S. 82 (1970).

Indeed, to permit the opinion of the District Court to stand would be to allow the federal courts to pull themselves up by their own boot straps. This Court in Schuster having constitutionally mandated treatment for inmates at Matteawan and the New York legislature and courts having heeded this admonition, the District Court would now use this fact to find a statutory right to treatment.

The Supreme Court has recognized that the management of New York prison is of acute interest to the State and is intricately bound to its laws, regulations and procedures. Preiser v. Rodriguez, 411 U.S. 475, 491-492 (1973). "Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges." Montanye v. Haymes, supra 5057.

The resources of New York State are not unlimited. At the current time, there is only one mental hospital for 17,000 state prisoners with approximately 330 beds.

Psychiatrists and psychologists are available at the different state prisons and this program is in an expansion stage. McKinney's Supp. 1976-1977, N.Y. Correction Law § 401 (effective Sept. 1, 1976).

The State of New York has determined that the use of its different facilities for the treatment of mental illness is best left to the prison doctors and Matteawan staff so that there can be a fluid and easily accomplished movement of inmates out of Matteawan to make room for others who are in more serious need. Absent a violation of the cruel and unusual punishment clause, Estelle v. Gamble, 45 U.S.L.W. 4023 (U.S. Nov. 30, 1976), such a policy does not violate the United States Constitution.

B. A right to medical treatment has never been recognized as a property right within the Fourteenth Amendment

Aside from the fact that the New York statutory scheme makes clear that plaintiffs have no right to treatment under New York law, the District Court's opinion is an unwarranted extension of the case law of the United States Supreme Court which has never recognized medical treatment

accorded an inmate as a liberty or property right to which due process attaches. The Supreme Court has simply held that ". . .deliberate indifference to serious medical needs of prisoners constitute the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment" Estelle v. Gamble, supra, 4025 (emphasis supplied). No liberty interest is involved at bar and property interests have been limited to those interests having an income producing effect, either directly or indirectly. Goss v. Lopez, 419 U.S. 565 (1975) (education); Perry v. Sinderman, 408 U.S. 593 (1972) (job tenure); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits) and Bell v. Burson, 402 U.S. 535 (1971) (driver's license necessary to practice occupation). Accordingly, a right to treatment claim is insufficient to invoke the procedural protections of the due process clause.

- C. Even assuming arguendo only that plaintiffs have a statutory right to psychiatric treatment at Matteawan State Hospital, plaintiffs are not entitled to the procedures identified by the District Court

"Once it is determined that due process applies, the question remains what process is due". Morrissey v. Brewer, 408 U.S. at 481. The interpretation and application

of the due process clause are practical and "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

As explained by the United States Supreme Court:

"...[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. . ." Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Here a medical decision is made by the director of the hospital that an inmate is no longer in need of retention. This decision is made on the basis of the

recommendation of a staff doctor. As was stated at the hearing, either directly or indirectly by the various physicians who testified, this decision is ultimately subjective in nature and is based on the physician's observations of the patient. If a physician determines no treatment is necessary for a patient, it would be anomalous, indeed, for a court to order it anyway.

Moreover, as pointed out above, the resources of New York State are not unlimited. In the context of a hospital with limited facilities, some judgment must be left to the physicians to treat those inmates with the most need. Even under the voluntary provisions of the Mental Hygiene Law, the length of hospitalization of a civilly committed patient remains with the Department of Mental Hygiene.

In short, the review of a decision by a staff doctor to release an inmate from Matteawan by the Director of the Hospital suffices for due process purposes. Zurak v. Regan, Slip. Sh. Op. 425 (2d Cir. Feb. 7, 1977).

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE REVERSED AND THE COM-
PLAINT DISMISSED

Dated: New York, New York
February 10, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

ARTICLE 16

State Hospitals for the Mentally Ill in the Department of Correction

- § 400. Establishment and purpose of the state hospitals for the mentally ill in the department of correction.
- § 401. Transfer of inmates from one state hospital in the department to another.
- § 402. Director.
- § 403. Superintendent as treasurer of the hospital.
- § 404. Salaries of resident officers.
- § 405. Powers and duties of superintendent and assistants.
- § 406. Quarterly estimates.
- § 407. Power of removal.
- § 408. Commitment of mentally ill inmates to a state hospital for the mentally ill in the department of correction.
- § 409. Disposition of mentally ill prisoners after expiration of term of imprisonment and any other patients who are neither prisoners nor charged with crimes.
- § 410. Prisoners on recovery to be transferred to prison.
- § 411. Certificate of conviction to be delivered to superintendent and copy filed.
- § 412. [Repealed]
- § 413. Communications with patients.
- § 414. Powers and duties of commissioner with respect to Matteawan state hospital.
- § 415. Escaped prisoners; reward; increased imprisonment.

§ 400. Establishment and purpose of the state hospitals for the mentally ill in the department of correction.—1. The department of correction shall maintain one or more hospitals, to be used solely for the purpose of holding in custody and caring for such mentally ill persons held under any other than a civil process as may be committed to the department by courts of criminal jurisdiction, or placed therein or transferred thereto by the commissioner of mental hygiene, and for such persons as may be committed thereto pursuant to the provisions of section eighty-five of the mental hygiene law, and for such convicted persons as may be declared mentally ill while undergoing sentence of imprisonment, or upon a commitment as youthful offenders, juvenile delinquents or wayward minors at any of the various penal institutions of the state, and for all female convicts becoming mentally ill while undergoing sentence. When a person is committed or placed in or transferred to the department under the provisions of article seven hundred thirty of the criminal procedure law or section eighty-five of the mental hygiene law, a copy of the minutes of the proceedings instituted to determine his mental condition shall be furnished to said hospital. The department of correction shall have the jurisdiction and control of such hospitals; but they shall be subject to visitation and inspection of the head of the department of mental hygiene, by himself and his authorized representatives from the department of mental hygiene.

2. The commissioner of correction may continue to maintain, as a hospital for the mentally ill, any such institution operated by the department for such purpose prior to the effective date of this

act, and may add to or close any such institution, and may establish and maintain one or more new hospitals for such purpose, in accordance with the needs of the department, provided any such action, other than continuance of the present institutions, is approved by the commissioner of mental hygiene, and provided that expenditures are within amounts made available therefor by appropriation.

3. The commissioner of correction shall promulgate rules and regulations designating the name and location of each institution to be used for such purpose and the sex, age range and other factors relevant to the classifications of persons who may be received therein. A copy of such rules and regulations shall be transmitted to the clerk of each court having jurisdiction to make a commitment under this article, and persons committed, placed or transferred as provided in this article shall be delivered to the proper institution as designated in such rules and regulations.

4. Whenever reference has been or hereafter will be made to the Dannemora state hospital or to the Matteawan state hospital such reference shall be deemed to mean any institution designated in the rules and regulations of the department pursuant to this section.

§ 401. Transfer of inmates from one state hospital in the department to another.—The commissioner of correction shall have power to transfer inmates from one state hospital for the mentally ill in the department to another and the provisions of law applicable to transfers between correctional facilities shall apply to transfers between state hospitals ordered by the commissioner.

§ 402. Director.—The commissioner of correction shall, whenever there is a vacancy, appoint a director for any state hospital maintained pursuant to this article, who shall be in the competitive class of the civil service certified from a promotion examination list pursuant to the provisions of article two section five of the mental hygiene law. The annual salary or compensation for such director shall be in accord with section one hundred thirty of the civil service law. Whenever the term "superintendent" appears in this article such reference shall mean director. The present superintendent of any such hospital, subject to removal as herein provided, shall continue in office as the director thereof while the institution is so maintained and until his successor is appointed.

§ 403. Superintendent as treasurer of the hospital.—The superintendent shall be the treasurer of the hospital, and before entering upon his duties, shall file with the attorney-general his undertaking to the people with sureties to be approved by the commissioner of correction, to the effect that he will faithfully perform his trust as such treasurer. He shall have the custody of the moneys, securities and obligations belonging to the hospital, and not required by laws to be or remain in the custody of the comptroller or in the state treasury, and shall open with some bank, in the vicinity of the hospital, to be selected with the approval of the comptroller, an account in his name as such superintendent, and immediately deposit in such bank all moneys received by him as such superintendent and treasurer, and shall draw therefrom only for the use of the hospital, and in the manner provided by the by-laws and upon the order of the steward, specifying the object of each payment. He shall keep a full and accurate account of the receipts and payments, as directed by the by-laws, and of such other matters as the commissioner of correction may prescribe, and balance all his accounts, annually, on the thirtieth day of June, and within forty days thereafter deliver to the commissioner of correction, a statement thereof and an abstract of such receipts and payments for the past year. His books and vouchers shall at all times be open to the inspection of the commissioner of correction, and he may at any time require of him a statement of his accounts and of the funds and property in his custody.

§ 404. Salaries of resident officers.—The commissioner of correction shall, from time to time, determine the annual salaries and allowances of the resident officers, and the same shall be paid in accordance with section two-a of the state finance law, twice each month on the first and sixteenth days thereof, on the audit and warrant of the comptroller, out of any moneys in the treasury available therefor by appropriation, to the superintendent, on his presenting a bill of particulars thereof signed by the steward and properly certified by such medical superintendent.

§ 405. Powers and duties of superintendent and assistants.—The superintendent shall be the chief executive officer of the hospital and shall:

1. Have the general superintendence of the building and grounds, together with their furniture, fixtures and stock, and the direction and control of all persons therein, subject to the rules and regulations adopted by the commissioner of correction, with power to assign their respective duties.

2. Give, from time to time, such orders and instructions as he may deem best calculated to insure good conduct, fidelity and economy in every department of the hospital.

3. Maintain salutary discipline among all who are employed by the institution, and enforce strict compliance with all instructions and orders given by him, and uniform obedience to all the rules and regulations of the hospital.

4. Cause full and fair accounts and records of all his doings, and of the entire business and operations of the institution to be kept regularly, from day to day, in books provided for that purpose, in the manner and to the extent prescribed in the by-laws.

5. See that all accounts and records are fully made up to the last day of June in each year, and present the principal facts and results, with his report thereon, to the commissioner of correction, within forty days thereafter. The resident officers, before entering upon their duties as such, shall severally take and file in the office of the department of state, the constitutional oath of office. The first assistant physician shall perform the duties and be subject to the responsibilities of the superintendent in his sickness or absence. The steward may personally purchase any supplies for the use of such hospital, but only in the name of the superintendent, and in each instance by his direction and not otherwise.

§ 406. Quarterly estimates.—The superintendent shall cause an estimate to be made quarterly, in accordance with forms to be approved by the state comptroller and commissioner of correction, of all moneys necessary for the support and maintenance of the hospital, which may be required to supplement the deficiencies in the earnings thereof. Such estimate shall be submitted, in accordance with section one hundred and seventeen of this chapter, to and examined by the commissioner of correction, who, if he is satisfied that it is correct, and that the articles named therein are actually needed for the support and maintenance of the hospital, shall certify to the same, and on production of such estimate so certified, to the comptroller, he shall draw his warrant on the state treasury for the amount thereof, and the department of taxation and finance shall pay such amount to the superintendent of the hospital, out of any money in the treasury appropriated for the support of such hospital. The provisions of this section are subject to the provisions of the state finance law relating to the powers and duties of the commissioner of general services, and to requisitions for material, equipment and supplies.

ated to be a youthful offender, wayward minor or juvenile delinquent confined therein is, in his opinion, mentally ill, such warden or other officer shall apply to a judge of a court of record to cause an examination to be made of such person by two examining physicians, other than a physician connected with such correctional facility, penitentiary, jail, reformatory or correctional institution. Such physicians shall be designated by the judge to whom the application is made. An examining physician, within the meaning of this article, is a physician possessing the qualifications prescribed by the provisions of section two of the mental hygiene law. Such physicians, if satisfied, after a personal examination, that such inmate is mentally ill, shall make a certificate to such effect.

- 1-a. In the city of New York, if the physician of a workhouse, city prison, jail, penitentiary or reformatory reports in writing to the warden or other officer in charge of such institution that a prisoner confined therein, serving a sentence of imprisonment, is in his opinion mentally ill, the warden or other officer in charge of said institution shall either transfer said prisoner to Bellevue or Kings county hospital for observation as to his mental condition by two examining physicians or shall secure two examining physicians to make such examination in his institution. Such physicians if satisfied from their personal examination and observation that the prisoner is mentally ill, shall make a certificate to such effect.

2. Upon such certificate of the examining physicians being so made, it shall be delivered to the warden or other officer in charge, who shall thereupon apply by petition forthwith to a judge of a court of record, annexing such certificate to his petition, for an order committing such inmate to a state hospital for the mentally ill in the department of correction. Upon every such application for such an order of commitment, notice thereof in

§ 407. Power of removal.—The commissioner of correction may remove the superintendent, for cause shown, after having given an opportunity to such superintendent to be heard thereon, and such officer shall not be reappointed to the office of superintendent, or to any other position in said hospital.

§ 408. Commitment of mentally ill inmates to a state hospital for the mentally ill in the department of correction.—1. Whenever the physician of any correctional facility, any county penitentiary, county jail or workhouse, any reformatory for women, or of any other correctional institution, shall report in writing to the warden or other officer in charge thereof, that any person undergoing a sentence of imprisonment or adjudi-

cated to be a youthful offender, wayward minor or juvenile delinquent confined therein is, in his opinion, mentally ill, such warden or other officer shall apply to a judge of a court of record to cause an examination to be made of such person by two examining physicians, other than a physician connected with such correctional facility, penitentiary, jail, reformatory or correctional institution. Such physicians shall be designated by the judge to whom the application is made. An examining physician, within the meaning of this article, is a physician possessing the qualifications prescribed by the provisions of section two of the mental hygiene law. Such physicians, if satisfied, after a personal examination, that such inmate is mentally ill, shall make a certificate to such effect.

1-a. In the city of New York, if the physician of a workhouse, city prison, jail, penitentiary or reformatory reports in writing to the warden or other officer in charge of such institution that a prisoner confined therein, serving a sentence of imprisonment, is in his opinion mentally ill, the warden or other officer in charge of said institution shall either transfer said prisoner to Bellevue or Kings county hospital for observation as to his mental condition by two examining physicians or shall secure two examining physicians to make such examination in his institution. Such physicians if satisfied from their personal examination and observation that the prisoner is mentally ill, shall make a certificate to such effect.

2. Upon such certificate of the examining physicians being so made it shall be delivered to the warden or other officer in charge, who shall thereupon apply by petition forthwith to a judge of a court of record, annexing such certificate to his petition, for an order committing such inmate to a state hospital for the mentally ill in the department of correction. Upon every such application for such an order of commitment, notice thereof in

writing, of at least five days, together with a copy of the petition, shall be served personally upon the alleged mentally ill person, and in addition thereto such notice and copy of the petition shall be served upon either the wife, the husband, the father or mother or other nearest relative of such alleged mentally ill person, if there be any such known relative within the state; and if not, such notice shall be served upon any known friend of such alleged mentally ill person within the state. If there be no such known relative or friend within the state, the giving of such notice shall be dispensed with, but in such case the petition for the commitment shall recite the reasons why service of such notice on a relative or friend of the alleged mentally ill person was dispensed with, and in such case the order for commitment shall recite why service of such a notice on a relative or friend of the alleged mentally ill person was dispensed with. Copies of the notice, the petition and the certificate or certificates of the examining physicians shall also be given the mental health information service.

3. The judge to whom such application for the commitment of the alleged mentally ill person is made may, if no demand is made for a hearing in behalf of the alleged mentally ill person, proceed forthwith on the return day of such notice to determine the question of mental illness, and if satisfied that the alleged mentally ill person is mentally ill, may immediately issue an order for the commitment of such alleged mentally ill person to a state hospital for the mentally ill in the department of correction for a period not to exceed six months from the date of the order.

4. Upon the demand for a hearing by any relative or near friend on behalf of such alleged mentally ill person, the judge shall, or he may upon his own motion where there is no demand for a hearing, issue an order directing the hearing of such application before him at a time not more than five days from the date of such order, which shall be served upon the parties interested in the application and upon such other persons as the judge, in his dis-

cretion, may name. Upon such day or upon such other day to which the proceedings shall be regularly adjourned, he shall hear the testimony introduced by the parties and shall examine the alleged mentally ill person, if deemed advisable in or out of court, and render a decision in writing as to such person's mental illness. If such judge cannot hear the application, he may, in his order directing the hearing, name some referee who shall hear the testimony and report the same forthwith, with his opinion thereon, to such judge, who shall, if satisfied with such report, render his decision accordingly. If it be determined that such person is mentally ill, the judge shall forthwith issue his order committing him to a state hospital for the mentally ill in the department of correction for a period not to exceed six months from the date of the order. Such warden or other officer in charge shall thereupon cause such mentally ill person to be delivered to the director of the appropriate state hospital as designated in the rules and regulations of the department of correction and such mentally ill person shall be received into such hospital and retained there until legally discharged or for the period specified in the order of commitment or in any subsequent order authorizing continued retention of such person in such hospital. Such warden or other person in charge before delivering said mentally ill person shall see that he is bodily clean. If such judge shall refuse to issue an order of commitment, he shall certify in writing his reasons for such refusal.

5. When an order of commitment is made, such order and all papers in the proceeding shall be presented to the director of the appropriate state hospital at the time when the mentally ill person is delivered to such institution, and a copy of the order and of each such paper shall be filed with the department of mental hygiene and also in the office of the county clerk of the county wherein the court is located which made the order of commitment. The judge shall order all such papers so filed in the county clerk's office to be sealed and exhibited only to parties to the proceedings, or someone properly interested, upon order of the court.

6. The costs necessarily incurred in determining the question of mental illness, including the fees of the medical examiners, shall be a charge upon the state or the municipality, as the case may be, at whose expense the institution is maintained, which has custody of the alleged mentally ill person at the time of the application for his commitment to the Matteawan state hospital, under the provisions of this section.

7. During the pendency of such proceeding the judge may forthwith commit such allegedly mentally ill person to a state hospital for the mentally ill in the department of correction upon petition and the affidavit of two examining physicians that the warden or other officer in charge is not able to properly care for such person at the institution

where he is confined, and that such person is in need of immediate treatment. Any person so committed shall be delivered to the director of the appropriate state hospital as designated in the rules and regulations of the department of correction.

8. If the director of a state hospital for the mentally ill in the department of correction shall deem that the condition of such mentally ill person requires his further retention in a state hospital in such department, he shall, during the period of retention authorized by the last order of the court, apply to a court of record in the county where such state hospital is located, for an order authorizing continued retention of such mentally ill person. The procedures for obtaining any order pursuant to this subdivision shall be in accordance with the provisions of subdivisions two, three, and four of this section. The period for continued retention pursuant to the first order obtained under this subdivision shall authorize continued retention of the mentally ill person for not more than one year and the period for the further continued retention of the mentally ill person authorized by any subsequent order under this subdivision shall be for periods not to exceed two years each.

9. If a mentally ill person whose commitment, retention or continued retention has been authorized pursuant to this section, or any relative or friend in his behalf, be dissatisfied with any such order, he may, within thirty days after the making of any such order, obtain a rehearing and a review of the proceedings already had and of such order, upon a petition to a justice of the supreme court other than the judge or justice presiding over the court making such order, who shall cause a jury to be summoned as in the case of proceedings for the appointment of a committee for a mentally ill person where the question of fact arising upon the competency of the person is tried by a jury, and shall try the question of the mental illness of the person so committed or so authorized to be retained, in the same manner as provided in said proceedings. Any such mentally ill person or the person applying on his behalf for such review may waive the trial of the fact by a jury and con-

sent in writing to trial of such fact by the court. If such petition for the hearing and review be made by other than the person so committed or authorized to be retained or the father, mother, husband, wife or child of such person, before such hearing or review shall be had, the petitioner shall make a deposit or give a bond, to be approved by a justice of the supreme court, for the payment of the costs and expenses of such rehearing or review and determination of the question of mental illness by a jury as aforesaid, if the order of commitment or authorizing continued retention is sustained. If the verdict of the jury, or the decision of the court when jury trial has been waived, be that such person is not mentally ill, the justice shall order the removal of such person from a state hospital and such person shall forthwith be transferred to a state correctional facility, or returned to the warden or other officer in charge of the institution from which he was received if such institution was not a state correctional facility. Where the verdict of the jury, or the decision of the court where a jury trial has been waived, be that such person is mentally ill, the justice shall certify that fact and make an order authorizing continued retention under the original order. Proceedings under the order shall not be stayed pending an appeal therefrom, except upon an order of a justice of the supreme court, and made upon notice and after hearing, with provision made therein for such temporary care and confinement of the alleged mentally ill person as may be deemed necessary.

10. The notice provided for herein shall be served by the sheriff of the counties of the state of New York, in which case the charges of such sheriff shall be a disbursement in such proceeding, or by registered mail on all persons required to be served other than the alleged mentally ill person.

\$409. Disposition of mentally ill prisoners after expiration of term of imprisonment and any other patients who are neither prisoners nor charged with crimes.—Every prisoner in Matteawan state hospital whose sentence has expired or who is otherwise entitled to release shall be dealt

with as hereinafter provided. Whenever any prisoner in the Matteawan state hospital shall continue to be mentally ill at the expiration of the term for which he was sentenced the director of such hospital may apply for his admission to a hospital for the care and treatment of the mentally ill as provided in the mental hygiene law. The director may, if it is his opinion that any such prisoner is so dangerously mentally ill that his presence in a hospital in the department of mental hygiene would be dangerous to the safety of the other patients therein, the officers or employees thereof, or to the community, make application to a court as provided in section eighty-five of the mental hygiene law and the provisions of such section shall govern such proceedings before such court.

The director of Matteawan state hospital may discharge any prisoner at the expiration of the term for which he was sentenced, and who is still mentally ill, but who, in the opinion of the director is reasonably safe to be at large. Such discharged

prisoner shall be entitled to suitable clothing adapted to the season in which he is discharged, and if it can not be otherwise obtained, the business officer, or other officer having like duties shall, upon the order of the director, or of the commissioner, as the case may be, furnish the same, and money not exceeding fifty dollars, to defray his expenses until he can reach his relatives or friends, or find employment to earn a subsistence. The director of the hospital may discharge any other person, who is not a prisoner, although he is still mentally ill, but who, in the director's opinion, is reasonably safe to be at large or is recovered, except those patients being retained pursuant to article seven hundred thirty of the criminal procedure law against whom indictments are outstanding and a warrant is on file with the director. Any patient retained pursuant to such sections of the code of criminal procedure, who has not recovered, may upon the order of the commissioner of correction with the consent of the commissioner of mental hygiene, be

transferred to any appropriate mental institution in the department of mental hygiene.

§410. Prisoners on recovery to be transferred to prison.—Whenever any prisoner, who shall have been confined in such hospital as an* mentally ill person, shall have recovered before the expiration of his sentence, and the superintendent shall so certify in writing to the agent and warden or other officer in charge of the institution, from which such prisoner was received or to which the commissioner of correction may direct that he be transferred, such prisoner shall forthwith be transferred to the institution from which he came by the superintendent of the hospital, or if received from one of the state prisons, to such state prison as the commissioner of correction may direct; and the warden or other officer in charge of such institution shall receive such prisoner into such institution, and shall, in all respects, treat him as when originally sentenced to imprisonment. Any inmate not a prisoner, held upon an order of a court or judge, in a criminal proceeding, may be discharged therefrom, upon the superintendent's certificate of recovery, made to and approved by such court or judge.

Any prisoner, before or after expiration of sentence, who, in the opinion of the superintendent, is a mental defective and who does not show evidence of mental illness, may be transferred by the commissioner of mental hygiene on an application made by the superintendent, accompanied by a certificate of mental defect made by two examining physicians, or by an examining physician and a certified psychologist, as defined in the mental hygiene law. Any inmate held on the order of a court or judge in a criminal proceeding who, in the opinion of the superintendent, is a mental defective and who does not show evidence of

* So in original.

mental illness may be transferred by the commissioner of correction to the Eastern Correctional Institution, or the application of the superintendent accompanied by a certificate of mental defect executed by two examining physicians, or by an examining physician and a certified psychologist. When such a transfer is made the superintendent shall notify in writing the district attorney of the county from which the inmate was committed and the clerk of the court making the commitment, who shall make proper record thereof. After the transfer of any such inmate he may be returned to the said hospital upon the order of the commissioner of correction, whenever in his judgment it shall appear that the said inmate is not a proper person to be detained in a state institution for mental defectives. The order of such commissioner directing the return of such inmate shall state the reasons for such return.

§411. Certificate of conviction to be delivered to superintendent and copy filed.—Whenever any prisoner shall be transferred to the Matteawan state hospital, the agent and warden or other officer in charge of the prison, penitentiary, reformatory or other correctional institution from which such prisoner is transferred shall cause a correct copy of the original certificate of conviction of such prisoner to be filed in the office of the warden or officer in charge, and shall deliver the original certificate to the superintendent of such hospital; and whenever any such prisoner shall be transferred to any correctional institution from such hospital, as hereinbefore provided, the superintendent shall deliver to the warden, or other officer in charge of such institution such original certificate, which shall be filed in the clerk's office of the same.

§412. [Repealed]

§413. Communications with patients.—No person not authorized by law or by written permission from the commissioner of correction shall visit the Matteawan state hospital, or communicate with any patient therein without the consent of the superintendent; nor, without such consent, shall any person bring into or convey out of the Matteawan state hospital any letter or writing to or from any patient; nor shall any letter or writing be delivered to a patient, or if written by a patient be sent from the Matteawan state hospital until the same shall have been examined and read by the superintendent or some other officer of the hospital duly authorized by the superintendent. But communications addressed by such patient to the county judge or district attorney of the county from which he was sentenced, shall be forwarded, after examination by such superintendent, to their destination.

§414. Powers and duties of commissioner with respect to Matteawan state hospital.—1. The commissioner of correction shall make rules and regulations not in conflict with the statutes of this state applicable to the government of said Matteawan state hospital and may approve rules and orders made by a superintendent thereof pursuant to section four hundred five of this chapter.

2. He shall prescribe a system of accounts and records to be kept at Matteawan state hospital and he shall also make rules and regulations for

the record of photographs and a means of identifying each person transferred thereto.

3. He shall appoint and remove, subject to the civil service law and rules, subordinate officers and employees of Matteawan state hospital.

§415. Escaped prisoners; reward; increased imprisonment.—Whenever any prisoner confined in the Matteawan state hospital, and not released on parole, shall escape therefrom, it shall be the duty of the superintendent to take all proper measures for the apprehension of the prisoner so escaped; and in his discretion he may offer a reward not exceeding fifty dollars for the apprehension and delivery of every such escaped prisoner; and, with the consent of the commissioner of correction, such reward may be increased to a sum not exceeding two hundred fifty dollars each. The superintendent may pay a reward not exceeding fifty dollars for the apprehension and delivery of any such escaped prisoner, whether such reward shall have been previously offered or not. Any such escaped prisoner, when arrested, shall serve out the full balance of his sentence remaining unexpired at the time of such escape, notwithstanding the time may have expired previous to his recovery, as if he had remained in prison, except as provided by article nine of this chapter. All suitable rewards and other sums of money paid for so advertising and apprehending any such escaped prisoner shall be paid by the superintendent out of the funds of the hospital.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Arlene R Silberman, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for appellants herein. On the 10th day of Feb, 1977, She served the annexed upon the following named person :

Jane Bloom, Esq
50 Market St
NY NY

Attorney in the within entitled proceeding by depositing ^{giving a copy to all} ~~mailing~~ a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

• Arlene R Silberman

Sworn to before me this
10th day of Feb, 1977

Joseph P. Scammell
Assistant Attorney General
of the State of New York